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ABSTRACT

This review analyzes case law in the area of student press and distribution and offers some guidelines for developing and implementing school policy and rules. Litigation is reviewed in order to clarify students' rights, limitations on administrative authority in matters of censorship and prior restraint, and actions in connection with writing and distributing publications for which students may be disciplined. It is recommended that school rules clearly state that students will not be punished for views they express in printed materials and that school officials attempt to persuade students to exercise tact and restraint in the exercise of their First Amendment rights. Rules requiring approval of student publications before distribution are not advised, for although the theoretical concept of prior restraint in the school setting has sometimes been upheld in court, specific instances usually have not. The policy of holding students accountable after printed materials have been distributed and for their actions, rather than for their words, is supported by case law. Students should be reminded that they have a legal responsibility to refrain from actions resulting in disruption of the educational environment or infringing on the rights of other students, and they should be held accountable when they breach it. (MJL)

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A Legal Memorandum

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STUDENT PRESS AND DISTRIBUTION ISSUES: Rights and Responsibilities

Student press and distribution issues have constrained the authority of public officials more than any other area of litigation involving student rights. Administrators have learned that many areas they believed were within their authority are not where freedom of the press is concerned. However, many students have also learned as a result of litigation that they are not provided first amendment protection for all conduct associated with publishing and distributing materials.

Legal Framework

The first amendment to the Constitution of the United States, in part, prohibits government from "...abridging the freedom of speech, or of the press;..." Because public schools are by their very nature government, the federal courts have had little difficulty applying first amendment constraints to situations involving the public school setting.

In Tinker v. Des Moines Independent Community School District,[1] the United States Supreme Court upheld the right of students to express their viewpoint in an orderly and nondisruptive manner in the public school setting. The Supreme Court did, however, emphasize that student rights under the first amendment are not absolute, and must be considered in the context of the school environment. The majority opinion in Tinker stated:

> [C]onduct by the student, in class or out of it, which for any reason--whether it stems from time, place or type of behavior--materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.[2]

Clearly, students in the public school setting have the right to express their views and opinions, but they do not have the right to conduct themselves in a manner that interferes with the educational environment or the rights of other students.

Student Rights

In reviewing competing student rights and responsibilities issues in student press and distribution, it is important to note and respect the degree to which the courts have protected students against disciplinary action being taken against them because of the content of materials they print and distribute.

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Student materials cannot be the basis for discipline merely because they offend or displease school officials, or because they raise controversial issues.[3] Even courts that have upheld discipline of students involved in student press and distribution activities have not been willing to cross the line separating the issues of content and conduct.[4]

When students have challenged school officials' authority regarding official school newspapers, many school officials have argued that a school newspaper is an integral part of an education program. As part of the school curriculum, it should be subject to the discretionary decisions of school officials. Some courts have shown general agreement with such arguments, but thus far they have not been sufficiently convincing to prevent court interference.[5]

School officials also have not found their control of the purse strings very successful in attempting to exercise authority over officially recognized student newspapers. In Reineke v. Cobb County School District,[6] a high school principal suspended further publication of a school newspaper after students brought a lawsuit against the school for alleged censorship. After analyzing the facts before it in light of the Tinker decision, the court ordered the release of the censored articles and ordered the school to reinstate publication of the newspaper.

In a more recent decision, it was ruled that a university could not withdraw or reduce a newspaper's funding because it disapproved of the paper's content.[7] Administrators have also been unsuccessful in limiting the number of school publications[8] or banning the sale of unofficial school publications.[9]

Other school officials have learned, as a result of court involvement, that what they felt was in their authority to control must yield when the issue is freedom of the press. The decision in Bayer v. Kinzler[10] presents an interesting example.

In this case, a principal prevented distribution of a school newspaper when he learned that the students had placed a four-page supplement in each paper containing information about contraception and abortion. While the articles were serious in nature and were intended to convey information, the principal was concerned that they would create controversy. The court noted that while the articles might be considered controversial, they did not seriously threaten to interfere with school work or discipline. It ordered the principal to refrain from interference with distribution of the paper containing the supplement.

First amendment restrictions of administrative authority are not limited to official school newspapers. A number of courts have limited administrators' authority to control distribution of privately published newspapers[11] and other materials, including advertising leaflets.[12] This is especially true when distribution occurs largely off school property.[13]

In reviewing cases involving student press and distribution, it is obvious that the courts do not generally approve of prior restraint placed on the printed word. The Seventh Circuit of the U.S. Court of Appeals has held that any school rules requiring prior review or approval of student publications is unconstitutional.[14]

While not all court decisions on the issue of prior restraint have been as restrictive as that in the Seventh Circuit, most are nearly so.[15] In Eisner v. Stamford Board of Education,[16] the Second Circuit ruled that a school rule requiring

prior review was valid, but that it was constitutionally defective in that it lacked proper procedures for submitting student publications for timely review by administrators.

The Court of Appeals for the Fourth Circuit has upheld the concept of prior restraint in at least three decisions, but in all three the specific school rule challenged was determined to be constitutionally defective.[17] On the issue of rules which require student publications to be reviewed and approved, a heavy burden of justifying the rules lies with the school, and a presumption against their legality exists.[18]

The frustration of school officials attempting to draft rules providing for review of student publications prior to distribution was epitomized in the Nitzberg v. Parks decision.[19] That case involved a rule on prior restraint which a federal district court found unconstitutional. School officials submitted three redrafts of the rule to the court before the judge concluded that the language drafted would pass constitutional scrutiny. On appeal, the court disagreed and found the rule constitutionally deficient in six respects.

Not all prior restraint issues have been resolved in favor of students, however. In Frasca v. Andrews,[20] the court upheld a principal's preventing the distribution of a school newspaper on the last day of school. The principal established that distributing the paper would probably provoke a violent confrontation between the newspaper staff and members of an athletic team, and that a student leader would be harmed by inaccurate accusations made against him without adequate opportunity to respond.

An interesting aspect of the case revolved around the absence of a rule requiring administrative review prior to distribution. The court ruled that under the circumstances--reasonable prediction of disruption and harm to a student--none was needed.

Student Responsibilities

Court decisions that limit administrators' authority outnumber the decisions lost by students. Yet, a significant number of rulings have upheld school officials' decisions. Even many of the decisions ruling in favor of students have expressly or implicitly limited student publication and distribution rights. A number have stated clearly that schools have the right to reasonably regulate the time, place, and manner of student distributions.[21] Students clearly do not, for instance, have the right to distribute materials in the middle of a mathematics class. But distribution before and after school, when it does not substantially interfere with the operation of the school, is protected.

It should be remembered that the Constitution does not establish absolute rights for anyone. All constitutionally protected rights, even those falling under the first amendment, have their limitations. The Tinker decision expressed the point very clearly when it said student conduct which materially and substantially disrupts the school environment or invades the rights of others is not protected under the first amendment.[22]

There are several court decisions which exemplify this point in the context of student press situations. One of the earliest is Baker v. Downey City Board of Education.[23] The facts in the case involved students who were suspended from

school for use of "profanity or vulgarity" in an underground newspaper. Nine issues of the newspaper containing criticism of the school and negative editorial comments were published and distributed with little incident. The tenth issue, distributed to students as they approached the school campus, contained for the first time a number of profane and vulgar words, and a photograph of President Nixon with an added and retouched extended middle finger.

Some 25 to 30 teachers complained that classes were interrupted by students who failed to pay attention because they were reading and talking about the paper. Parents and teachers inquired as to the disciplinary action that would be taken, and some students indicated that if no disciplinary action was taken, they would not feel restrained in using the same language.

In reviewing the facts and law before it, the court in Downey concluded that the factors which resulted in disciplinary action were the use of profane and vulgar terms, and the resulting classroom disruption. The court concluded that the students were not disciplined for what they said, but for the profane and vulgar manner in which they expressed their views.[24]

Another interesting decision involving disruption of school was Dodd v. Rambis.[25] In that case, school officials successfully defended their action in suspending and later expelling several students who attempted, through the distribution of leaflets, to incite a student walkout. An initial walkout of more than 50 students was staged in protest of the school's enforcement of smoking and attendance regulations. The participating students gathered directly across the street from the high school and distracted many students who remained in class. Students who walked out received a three-day suspension.

On the evening of the same day, several students met and drafted a leaflet which called for a second student walkout two days later. On the next day, five students were apprehended distributing the leaflets. They were suspended for three days pending a hearing to consider their expulsion. On the day of the planned walkout, only a few students walked out of classes.

A few days later, the five students were expelled for violating a rule prohibiting conduct that disrupted or had a reasonable likelihood to disrupt or interfere with school activities. The court in Dodd was faced squarely with a challenge to school officials' authority in disciplining students for distributing leaflets advocating a walkout. The court found that the student conduct was protected by the first amendment, but that under the Tinker decision, the school officials acted reasonably in forecasting and preventing a serious disruption of the school environment.

A similar result occurred in a case involving college students in Speake v. Grantham.[26] In that case, a group of students was disciplined for possessing and distributing leaflets containing false and misleading information about the cancellation of classes. The court ruled that the students were not punished for exercising their first amendment rights, but for promoting or attempting to promote a serious disruption of educational activities.[27]

In addition to cases upholding the authority of school officials to act in preventing disruptions, or to discipline students involved in promoting disruptions, there are several court decisions upholding the authority of school officials to protect the interests and rights of other students. The oldest of these, Katz v. McAulay,[28] involved a long-standing rule prohibiting solicitation of money from students.

A group of students wanted to distribute leaflets soliciting funds for the legal defense of eight persons on trial for anti-Vietnam War demonstrations. The students challenged school officials' authority to prevent distribution of the leaflets. The court found that the rule was promulgated to protect students from the annoyance and pressures created by multiple solicitations, not to stifle free press and distribution rights. The court concluded that the obvious effects of solicitation in terms of competition for the time, attention, and interest of students and staff were harmful to the school's educational environment and upheld the school officials' authority to administer the rule.

The legitimacy of school officials' interest in protecting students was also upheld in a case involving a principal's actions halting distribution of a school newspaper and disciplining the students involved. At issue in Williams v. Spencer[29] was a school rule that prohibited publication and distribution of any material which "encourages actions which endanger the health and safety of students."

The basis for the principal's action was the inclusion in the publication of a paid advertisement for the Earthworks Head Shop, a store that specialized in selling drug paraphernalia. The advertisement primarily promoted a waterpipe used to smoke marijuana and hashish, but it also advertised cocaine paraphernalia.

The court found that the advertisement encouraged the use of drugs and did, therefore, endanger the health and safety of students in violation of the school rule. The court ruled that school officials had the authority to act in situations endangering students, whether or not the school was actually disrupted. The court concluded that disruption was one, but not the only, justification for school authorities to restrain distribution of a publication.

The court in Williams expressly distinguished its ruling from three previous decisions in the same circuit overturning prior restraint rules. It strongly implied that prior restraint rules require greater court scrutiny than discipline imposed after distribution of student publications has occurred. It also noted that commercial speech in the form of advertisements, although protected, is not entitled to the same high degree of protection as other types of speech.

Another interesting and important decision upholding school officials' authority in limiting student distributions is Tractman v. Anker.[30] School officials refused to allow student newspaper staff members to distribute a questionnaire on student sex attitudes, knowledge, and experience. They defended their refusal on the basis that the questionnaire had the potential of inflicting psychological harm on some of the students responding to the questionnaire. The court found the expert testimony verifying the administrators' concerns to be sufficiently convincing, and upheld their actions.

It has been difficult for the court to separate serious improper conduct on the part of students from their acts of distributing publications in several student press decisions. In those cases, the courts have upheld discipline imposed on the students. In Sullivan v. Houston Independent School District,[31] a principal was involved in several incidents with a student who sold an underground newspaper in violation of a prior restraint rule. On two occasions the student directed profanity and vulgarity at the principal. The court found that the student's conduct outweighed his claim to first amendment protection, and that school officials had sufficient grounds for imposing discipline.

Similar results occurred in Schwartz v. Schuker[32] and Graham v. Houston Independent School District.[33] The latter case involved students who published and distributed an underground newspaper, largely to make a show of violating a school rule prohibiting such conduct. In upholding discipline imposed on the students, the court noted that the students were disciplined more for disobedience than for distributing protected material.

Several court decisions sustaining student challenges to prior restraint rules have created important inferences with regard to the imposition of discipline after distribution. In Quarterman v. Byrd,[34] the court noted that the language used by a student in a publication was inflammatory and potentially disruptive, but because the student had been disciplined for violating a prior restraint rule, the actions of school officials could not be upheld. The inference is that discipline of the student might have been upheld had he been punished for distributing inflammatory materials rather than violating the prior restraint rule.

In Baughman v. Freienmuth,[35] the court expressly stated that school rules imposing prior restraint must be drafted more precisely than rules imposing post-publication sanctions. Also, from Thomas v. Board of Education,[36] it can be inferred that the right to discipline a student might have been sustained if the student had been punished for insubordination rather than for off-campus activities associated with a publication.

Conclusion

This review of court decisions regarding student press and distribution issues presents a generalized picture which should be helpful to those seeking to develop and implement school policy and rules. Such rules should clearly state that students will not be punished for the views they express in printed materials, and school officials must be careful not to engage in knee-jerk reactions to the printed word. They will be much better off using intellectual arguments to educate and persuade students to exercise tact and restraint in the exercise of their first amendment rights.

Much time and many dollars have been spent developing rules that require student publications to be reviewed and approved by school officials prior to distribution. Yet, the courts have made it abundantly clear that prior restraint is not a preferred approach. While a number of courts have upheld the theoretical concept of prior restraint in the school setting, few have actually upheld specific instances of it. The cost in time and money for both the development of rules and their defense in case of court challenge strongly mitigate against the use of prior restraint.

The preferred route is to hold students accountable for their actions, rather than their words, after distribution takes place. A significant body of case law indicates that students may be disciplined for actions and conduct associated with publication and distribution of materials. Drafters of school policy and rules should therefore shift their emphasis as much as possible from prior restraint considerations to efforts to hold students accountable after the fact.

Students have a legal responsibility to refrain from activity that results in material and substantial disruption of the educational environment, or which may infringe on the rights of other students. They need to be reminded of that responsibility and held accountable when they breach it, even in the difficult area of student publications.

Footnotes

1. 393 U.S. 503, (1969).
2. Id., at 513.
3. E.g., Papish v. Board of Cur., 410 U.S. 667, (1973); Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); Thomas v. Board of Educ., 607 F.2d 1043 (2d Cir. 1979).
4. E.g., Dodd v. Rambis, 535 F. Supp. 23 (S.D. Ind. 1981); Baker v. Downey City Bd. of Educ., 307 F. Supp. 517 (C.D. Calif. 1969).
5. E.g., Zucker v. Panitz, 299 F. Supp. 102 (S.D. N.Y. 1969); See, Gambino v. Fairfax Cty. Sch. Bd., 429 F. Supp. 731 (E.D. Va. 1977); aff'd., 564 F.2d 157 (4th Cir. 1977).
6. 484 F. Supp. 1252 (N.D. Ga. 1980).
7. Stanley v. Magrath, 719 F.2d 279 (8th Cir. 1983).
8. Pliscou v. Holtville Unif. Sch. Dist., 411 F.Supp. 842 (S.D. Calif. 1976).
9. Peterson v. Board of Educ., 370 F.Supp. 1208 (D. Nebr. 1973); Bright v. Los Angeles Unif. Sch. Dist., 556 P.2d 1090 (Sup. Ct. of Calif. 1976).
10. 383 F. Supp. 1164 (E.D. N.Y. 1974); aff'd. 515 F.2d 504 (2d Cir. 1975).
11. E.g., Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Baughman v. Freienmuth, 478 F. 2d 1345 (4th Cir. 1973).
12. E.g., Hernandez v. Hanson, 430 F. Supp. 1154 (D. Nebr. 1977).
13. E.g., Thomas v. Board of Educ., 607 F.2d 1043 (2nd Cir. 1979); Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972).
14. Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).
15. E.g., Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972); but see, Nicholson v. Board of Educ., 682 F.2d 858 (9th Cir. 1982) (prior restraint in the context of teacher termination); Frasca v. Andrews, 463 F. Supp. 1043 (E.D. N.Y. 1979) (prior restraint in context of likely disruption and harm to a student).
16. 440 F.2d 803 (2d Cir. 1971).
17. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Nitzberg v. Parks, 525 F. 378 (4th Cir. 1975).
18. E.g., Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973).
19. 525 F.2d 378 (4th Cir. 1975).
20. 463 F. Supp. 1043 (E.D. N.Y. 1979).
21. E.g., Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960, 969 (5th Cir. 1972); Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972).
22. See supra note 2 and accompanying text.
23. 307 F. Supp. 517 (C.D. Calif. 1969).
24. Id., at 527.
25. 535 F. Supp. 23 (S.D. Ind. 1981).

26. 317 F. Supp. 1253 (S.D. Miss. 1970), aff'd. 440 F. 1351 (5th Cir. 1971).
27. See also, Norton v. Discipline Comm., 419 F. 2d 195 (6th Cir. 1969).
28. 438 F.2d 1058 (2nd Cir. 1971) cert. den. 405 U.S. 933,(1972).
29. 622 F.2d 1200 (4th Cir. 1980).
30. 563 F.2d 512 (2nd Cir. 1977) cert. denied, 435 U.S. 925,(1978).
31. 475 F.2d 1071 (5th Cir. 1973), cert. denied, 414 U.S. 1032, (1973).
32. 298 F. Supp. 238 (E.D. N.Y. 1969).
33. 335 F. Supp. 1164 (S.D. Tex. 1970).
34. 453 F.2d 54, 57 (4th Cir. 1971).
35. 478 F.2d 1345, 1349 (4th Cir. 1973).
36. 607 F.2d 1043, 1050, note 12, (2nd Cir. 1979).

This Legal Memorandum was contributed by Larry D. Bartlett, administrative consultant, Department of Public Instruction, state of Iowa.

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